No. 87-9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

MCDONNELL DOUGLAS CORPORATION,
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, and BRYAN RAYNOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The true question presented by the Petition for Writ of Certiorari is:

Whether a state action arising out of a valid state interest in protecting injured workers from discrimination should be preempted solely because the Petitioner may elect to create a question as to the terms of a collective bargaining agreement in complying with the state order?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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To The Honorable Chief Justice And Associate Justices Of The United States Supreme Court:

Respondent, Bryan Raynor, respectfully submits the following in answer to the Petition for Certiorari in the above entitled matter. Respondent respectfully submits there is no factual or legal basis for the grant of certiorari.

JURISDICATIONAL STATEMENT

The Petitioner allegedly invokes jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Petition does not set forth which portion of the said section is applicable. The Petition does not appear to question the validity of California Labor Code Section 132a as being repugnant

to the Constitution, treaties, or laws of the United States. No other portion appears applicable. It is therefore submitted jurisdiction is not properly invoked.

SUMMARY OF THE CASE

The Petitioner, McDonnell Douglas Corporation, has previously been found guilty of discriminating against Respondent, Bryan Raynor, for filing a workers' compensation claim. Such conduct is prohibited by California Labor Code Section 132a. The Petitioner has previously sought and been denied review by the California Supreme Court of that decision.

Petitioner refused to compensate the Respondent Raynor for lost wages and to reinstate him as required by Labor Code Section 132a. Respondent Raynor invoked supplemental enforcement proceedings before the Workers' Compensation Appeals Board. Petitioner then claimed it was not obligated to comply with the prior decision and has raised the provisions of a collective bargaining agreement as a defense against either reinstatement or back wages.

The proceedings in the California Workers' Compensation Appeals Board and appellate courts solely arose out of the provisions of California Labor Code Section 132a. No cause of action was alleged out of the collective bargaining agreement.

Petitioner argues to reinstate Respondent may give rise to a grievance and a subsequent arbitration decision which would be adverse to the Workers' Compensation Appeals Board ruling. This argument has been rejected by the Appeals Board and the appellate courts of the State of California.

Petitioner now seeks certiorari alleging federal labor law preemption.

Respondent respectfully submits there is no showing of Congressional intent to preempt valid state court action to protect a valid state interest in Workers' Compensation.

Petitioner fails to advise the Court the Petition was not only denied on the merits but as procedurally defective. California Labor Code Section 5902 requires a Petition for Reconsideration before the Appeals Board be verified. The Petition was not. The Appeals Board denied the Petition not only on the merits but for the fact it failed to comply with Section 5903 and 5902. 5902 specifies the time limits for filing a verified petition. The Court's attention is directed to page Appendix A-41 of the Petition.

ARGUMENT

THE CAUSE OF ACTION AROSE OUT OF AND RELATES TO A VALID STATE WORKERS' COMPENSATION LAW, NOT A COLLECTIVE BARGAINING AGREEMENT.

The employee's claim of discrimination arose from California Labor Code Section 132(a) and does not require any interpretation of the labor contract. Unlike *Hechler* and *Allis-Chalmers*, an interpretation of the labor contract is not required to determine if a cause of action or remedy exists. *International Brotherhood of Electrical Workers v. Hechler*, 107 S. Ct. 2161 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The employer's duty to not discriminate is not pursuant to any relationship arising out of the labor contract. The duty arises only

from the relationship between the individual employee, the employer, and Section 132(a).

The employer had the duty without regard to the labor contract. There is no implied obligation arising from the contract necessary to any finding of the employer's duty or liability. The claim's independence from the contract is evident by determining if it could have arisen without a labor contract in effect. Suppose the employee had been injured and there was no labor contract. Would not the employee still have a claim of discrimination with the Workers' Compensation Board? Of course he would, just as millions of non-union employees do in California. There is nothing implied from the labor contract that is necessary for the employee's claim. The statute and claim functions independent of the contract.

The remedy is also independent from the labor contract. The Workers' Compensation Judge (WCJ) correctly held "[T]he Collective Bargaining Agreement does not bar such reinstatement and is not relevant in this instance." Petitioner's Appendix, A27. This refutes the employer's claim that the WCJ interpreted provisions of the contract and that the employee can not be reinstated without violating the contract. In addition, the employer has over 7,500 personnel not covered by the labor contract. Petitioner's Appendix, A19. The employee can be reinstated to that part of the workforce without affecting the employer's contractual relations with the union.

Arbitration is not an issue in this case and the petitioners emphasis on it is unwarranted. Arbitration is for contract disputes and the facts indicate none exists here. No party has alleged a breach of the labor contract. Furthermore, the employee could not have filed a grievance over the discrimination because the claim arose only

from the employer's violation of the Workers' Compensation law.

The employer claims the employer may potentially violate the terms of a collective bargaining agreement if it complies with the Appeals Board Order. The employer argues this could result in a grievance. This could result in a later arbitrator's decision which might find the employer has breached the contract in the manner or method by which it restores Mr. Raynor to employment. This is pure speculation. There is no grievance pending. The employer has shown no facts upon which the Court may speculate a grievance may arise. The Court is asked to speculate and anticipate a potential conflict. It is respectfully submitted that is not the basis for this Court to grant certiorari.

THERE IS NO SHOWING OF CONGRESSIONAL INTENT TO PREEMPT CALIFORNIA LABOR CODE SECTION 132a, WHICH PROSCRIBES DISCRIMINATORY CONDUCT IN WHICH THE STATE HAS A VALID INTEREST IN THAT THE RIGHTS AND OBLIGATIONS THEREIN DO NOT DEPEND ON A COLLECTIVE BARGAINING AGREEMENT.

The court has limited the scope of pre-emption to congressional intent, *Allis-Chalmers v. Lueck,* 471 U.S. 202, 212 (1985) and held that it will sustain a local regulation "unless it conflicts with Federal Law or would frustrate the Federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states." *Allis-Chalmers* quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1963).

California Labor Code Section 132(a) does not conflict with Federal Law. The law declares the state's policy of

protecting injured workers from resulting discrimination and, in the present case, provides the remedies of financial reimbursement and employment reinstatement. These provisions do not regulate "conduct that is actually protected by Federal Law" and so preemption does not follow as a matter of substantive right. *Brown v. Hotel and Restaurant Employees,* 468 U.S. 491, 503 (1984).

In addition, Section 132(a) does not frustrate the Federal Labor scheme. In analyzing congressional intent and the Federal Labor scheme, the court has reasoned "State law which frustrates the effort of Congress to stimulate the smooth functioning of that process [of free and collective bargaining] thus strikes at the very core of Federal Labor policy." *Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

In the present case, Section 132(a) does not affect the process of free collective bargaining. It protects injured workers from subsequent discrimination whether they are covered by a labor contract or not. Section 132(a) disputes are litigated between the employee, employer, and state; quite independent of the collective bargaining process. Therefore, 132(a) is outside the scope of preemption.

The totality of the circumstances in this case shows that Congress did not seek to occupy the field to the exclusion of the states. Section 132(a) is an integral part of Workers' Compensation Law. Its remedies inherently deal with wages, hours of work, places of work and reinstatements to employment; just as every labor contract does.

If Congress intended to preempt the remedy of reinstatement where there is a labor contract in effect; then Congress must have intended to also preempt all cases

where the workers' compensation remedy overlaps other topics in the labor contract. That conceivably means all cases where the parties dispute wages, hours or occupations.

As preposterous as this sounds, it is what the employer seeks in the present case. In contending that Federal preemption "must be extended to state administrative remedial proceedings" because the state agency's decision is related to the labor contract; Petitioner's petition, p. 8, the employer is, in effect, asking that all workers' compensation disputes at workplaces with a labor contract be federally preempted. Consequently, after an analysis of the totality of the circumstances, in this case, it can not be reasonably discerned that Congress sought to exclude the state from this field of law.

CONCLUSION

It is respectfully submitted certiorari should be denied in that:

1. The Petitioner has failed to establish jurisdiction for the Court to act;

2. The State of California has a valid state interest in protecting its injured workers from discrimination independently of any collective bargaining agreement;

3. The cause of action involved herein does not arise out of the collective bargaining agreement; and

4. The Petitioner failed to timely seek Reconsideration even at the state administrative level.

WHEREFORE, Respondent Bryan Raynor respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

RICHARD J. CANTRELL
A Member of
CANTRELL, GREEN, PEKICH
& ZAKS
A Professional Corporation

APPENDIX A

Statute

California Labor Code, Section 132(a) states, in pertinent part:

Nondiscrimination policy. It is declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file an application for adjudication with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), altogether with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.

Proceedings for increased compensation as provided in paragraph (1), or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but these proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee. The appeals board is vested with full power, authority, and jurisdiction to try and determine finally all the matters specified in this section subject only to judicial review, except the appeals board shall have no jurisdiction to try and determine a misdemeanor charge.

California Labor Code Section 5902 states:

Requirements of petition for reconsideration. The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board. The petition shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.

California Labor Code Section 5903 states:

Grounds for reconsideration. At any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers' compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration upon one or more of the following grounds and no other:

(a) That by the order, decision, or award made and filed by the appeals board or a workers' compensation judge, the appeals board acted without or in excess of its powers.

(b) That the order, decision, or award was procured by fraud.

(c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

(e) That the findings of fact do not support the order, decision, or award.

Nothing contained in this section shall limit the grant or continuing jurisdiction contained in Sections 5803 to 5805, inclusive.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 21, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "McDonnell Douglas Corporation vs. Workers' Compensation Appeals Board of the State of California, Bryan Raynor" in the United States Supreme Court, October Term 1987, No. 87-9;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

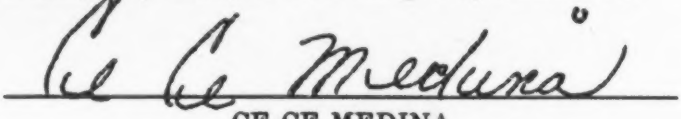
Workers' Compensation Appeals Board
P.O. Box 6759
San Francisco, California 94101-6759

Irell & Manella
1800 Avenue of the Stars
Suite 900
Los Angeles, California 90067

All Parties Required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 21, 1987, at Los Angeles, California



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